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## NEW E-DISCOVERY RULES PROPOSED

Judicial Conference Considers  
'Safe Harbor' for Data  
Destruction

BY RICHARD ACELLO

Demands for e-mails and documents stored on computer hard drives have raised questions and eyebrows among still-paperbound attorneys.

Now, the Judicial Conference of the United States is stepping forward with proposed standards and amendments to the Rules of Civil Procedure designed to bring guidance and clarity to the e-discovery process. The proposals, from the Advisory Committee on Civil Rules, are in draft form and will go through lengthy review processes before they are approved.

The ABA Section of Litigation's E-Discovery Task Force also is addressing the topic of electronic discovery with its proposed [Amendments to Civil Discovery Standards](#) that are published by the association. The proposals will be presented to the House of Delegates at the annual meeting next month in Atlanta.

"There is nothing in the ABA standards that changes the law," says Trish Refo, an e-discovery task force member and Litigation Section chair. "These are practice tools for practitioners."

U.S. District Court Judge Lee Rosenthal developed the draft for the federal advisory committee. It lists amendments to the following civil rules:

- Rule 16, on pretrial conferences.
- Rule 26, on general provisions governing discovery.
- Rule 33, on interrogatories to parties.
- Rule 34, on production of documents and electronically stored information.
- Rule 37, on failure to make disclosures or to cooperate.
- Rule 45, on subpoenas.

A potential hot topic in the advisory committee proposal is the "safe harbor"

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provision, Rule 37(f). It provides that "unless a court order requiring preservation of electronically stored information is violated, the court may not impose sanctions under these rules on a party when such information is lost because of the routine operations of its electronic information system if the party took reasonable steps to preserve discoverable information."

"This amendment is favored by large corporations and hotly contested by plaintiffs attorneys," says Virginia Llewellyn, vice president with Applied Discovery, an electronic discovery firm owned by LexisNexis. "The perfect example is the pharmaceutical company. They're really looking for something like the safe harbor [because] they're in litigation 365 days a year. Every time they release a product, they know they will be sued."

Another topic addressed in these amendments is the inadvertent release of material subject to attorney-client privilege. The question: If the material is inadvertently produced, is privilege waived?

The conference suggests "parties may attempt to minimize ... costs and delays by agreeing to protocols that minimize the risk of waiver." They could agree that the responding party will provide requested material without waiving any privilege, known as a "quick peek." The requesting party then designates the documents it wishes to actually have produced. Alternatively, parties could enter a "clawback agreement," so that production without intent to waive privilege should not become a waiver so long as the producing party identifies the documents mistakenly produced.

Rosenthal says there will be a formal publication of the proposed amendments in early August. A six-month comment period follows, with three public hearings, on the East and West coasts and in the Midwest. If changes are made, there will be a republication and a new comment period.

Then, from the advisory committee, the draft will go to the Standing Committee on Rules of Practice and Procedure, and then to the Judicial Conference, which is the policy-making arm of the courts. Should the conference approve, the proposals go to the U.S. Supreme Court. Assuming approval there, they wind up before Congress. If Congress does not disapprove them, they become law on Dec. 1 of the year they go to Congress.

There is the possibility that because of technological change, the proposed rules will be outdated by the time they're approved. "We are quite sensitive to that problem and of the need to make the language of these rules specific enough to be helpful, but sufficiently open-ended to not be limited to current technology," Rosenthal says. "One of the things we are asking comment on is whether we have succeeded."

The proposals from the ABA's E-Discovery Task Force anticipate that parties will work out the details of e-discovery in a spirit of cooperation rather than using e-discovery to gain leverage. They attempt to provide guidance to practitioners with checklists.

In its proposals for Standard 29, for example, the task force advises lawyers where electronic data can be found, including databases, networks, computer systems, servers, archives, backup or disaster recovery systems, laptops, personal digital assistants, mobile phones and pagers.

Having listed where the information may be found, proposed Standard 31

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suggests parties confer about anticipated electronic discovery requests. Subjects for discussion could include subject matter, time necessary to produce, whether the data exists in a "searchable form," whether the data will be produced in electronic form or hard copy, relevant data retention policies and the allocation of costs, among other factors.

A potential hot issue is raised by ABA Standard 29b(ii), which says a party may specify whether electronic information should be produced in hard copy, in electronic form or both, Llewellyn says.

"It allows the requesting party to ask for electronic production and shifts the burden to the responding party to say why they would not be able to produce it that way," Llewellyn says. "The providing party would rather provide it in paper because it's harder to find anything. The requesting party would rather have it electronically because it's easier to sort through."

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